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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 391

LEWIS E. NASH,

Petitioner,

vs.

PETER RAUN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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No. 391

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action at law brought in the United States District Court for the Western District of Pennsylvania by Lewis E. Nash, plaintiff, petitioner herein, against Peter Raun, defendant, respondent herein, for damages arising as a result of the negligent operation by respondent

of his truck which collided with an automobile operated by petitioner on October 9, 1941, in the County of Erie, State of Pennsylvania. The accident occurred at the intersection of Route 89 with Station Road. Route 89 is a through highway running in a northerly-southerly direction. Station Road is a highway running in an easterly-westerly direction. The petitioner had come from Chautauqua, New York, and was going to the site of his employment in the City of Erie, Pennsylvania. He was proceeding westwardly on Station Road. The respondent was driving an International truck, the weight of which, including a load of empty and filled milk cans, totaled Six Thousand Two Hundred (6,200) pounds (R. 111). The respondent was driving in a northerly direction on Route 89 (R. 111). The front end of the respondent's International truck ran into the left middle side of the petitioner's Chevrolet touring car, pushing the said Chevrolet car ahead of it in a northerly and westwardly direction. The International truck proceeded on north on Route 89, turned completely around, tipped over, and slid on its left side about Twelve (12) feet to the north (R. 124). The petitioner's Chevrolet touring car landed in a ditch on the west side of Route 89, approximately Forty (40) feet from the place where it was struck.

At the point of intersection, the construction of Route 89 across Station Road is such that it creates a hump hazard to travel from the east on Station Road making it impossible for an automobile going west on Station Road to cross Route 89 at a rapid rate of speed. (See photo, Defendant's Exhibit "C" printed as an Appendix hereto.)

Witnesses on behalf of the petitioner, who live about Three Hundred (300) feet from the intersection, testified that they heard a loud crash about 7:30 A. M. (R. 26). Upon proceeding to the scene of the accident they found petitioner's car standing upright in a ditch paralleling the

west side of Route 89 about Twenty-five to Thirty (25-30) feet north of Station Road and facing the intersection (R. 12). The center part of the left side of the car was crushed (R. 13). The front door on the right side was open, and the front seat and the contents were outside the car. There was no damage to the front of the car (R. 13). The headlights were lit and the engine running (R. 28). Petitioner was lying a few feet back of the car with his head in the ditch and his feet on the embankment. He was unconscious and apparently severely injured (R. 14).

Respondent's truck was also on the west side of Route 89 about Twelve (12) or more feet north of petitioner's car (R. 15). The truck was lying on its side with its engine facing south toward the intersection. The front fenders were somewhat damaged and the middle of the front axle was Four (4) inches in front of the wheels and was bent in the shape of a bow (R. 16; R. 25). Milk cans carried on the truck were scattered over the road.

There were tire marks on the right side of Route 89 approaching the intersection which were visible for about Thirty (30) feet from the center line of the intersection (R. 18). The marks were such as would be made by the skidding of a tire over a concrete surface (R. 19). There were other tire marks beginning about the center of the intersection and running in the direction of the petitioner's car where it rested in the ditch. They were not too distinct, about Five (5) or Six (6) inches wide, and of a "wavery" nature (R. 20).

> (The last three paragraphs were taken directly from the Opinion of the Circuit Court of Appeals filed May 14, 1945.)

The visionary hazard was increased at the time of the accident by a fog which reduced the range of vision to

"from 5 to 6 feet". This fog is specifically testified to by witness Margaret Jones. Her testimony appears on Page 33-A of the record and is as follows:

> "Q. How far were you from the Nash (petitioner's) car when you were first able to distinguish it was an automobile?
> "A. Oh, a few feet.
> "Q. Well, how many?
> "A. Five or six."

Peter Raun, the respondent, admitted that he was driving at the rate of 25-30 miles per hour at the time of the collision (Page 112-A of the record).

The trial was by jury. A verdict and judgment were rendered in favor of petitioner against respondent for Thirteen Thousand Five Hundred ($13,500) Dollars (R. 180). An appeal from said judgment was taken by Peter Raun, respondent, to the United States Circuit Court of Appeals for the Third Circuit, which Court reversed the judgment of the District Court.

The principal questions involved on said appeal as enumerated in the brief of the respondent filed in the United States Circuit Court were:

> 1. Was there sufficient evidence upon which to conclude that the respondent was guilty of negligence?
>
> The Court below answered "Yes."
>
> 2. Did the petitioner present a case free of contributory negligence?
>
> The Court below answered "Yes."

Petitioner here submits that the only legal question of merit involved in the record may be stated as follows:

> Can a citizen driving a car at the rate of 25-30 miles per hour in a fog which reduces visibility to from Five to Six feet not be guilty of negligence per se?

Jurisdictional Statement

It is contended that the Supreme Court of the United States has jurisdiction to review the judgment here in question because the Circuit Court's reversal of the Trial Court's judgment was a denial of the petitioner's right of trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Secondly, because the respondent's failure to comply with Rule 50 of the United States District Court, wherein the respondent filed a motion for a directed verdict but did not file any specific reasons therefor, should have been construed in the United States Circuit Court as a waiver of his right to press the motion for directed verdict.

Thirdly, because the respondent's motion for directed verdict was not properly before the Circuit Court of Appeals because the respondent neglected to comply with the specific requirements of Rule 75 of the Circuit Court of Appeals. The petitioner, under this rule, was entitled to notice from the respondent of a statement of the points on which the respondent intended to rely on the appeal.

Fourthly, because the decision of the Circuit Court of appeals reversing the District Court is in direct conflict with decisions of the Supreme Court of Pennsylvania, decisions of other United States Circuit Courts of Appeals and decisions of the United States Supreme Court and in violation of the well-established legal principle that the testimony introduced for petitioner should be taken as true and viewed in the light most favorable to the petitioner; and that to secure reversal for refusal to give binding instructions the evidence supporting the verdict must be proved untrue by incontrovertible physical facts; and that all of the evidence supporting the jury's verdict must be considered true and that unfavorable rejected.

And, lastly, because the Circuit Court of Appeals refused to apply the specific Pennsylvania statutory definition of negligence; Act of Assembly 1925, May 1, P. L. 905, Article 10, Section 1002, as amended 1939, June 27, P. L. 1135, Section 23; 1941, April 15, P. L. 17, Section 10, and as reported in 75 Purdon's Pennsylvania Statutes Annotated, Section 501, which provides as follows:

> "(a) Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic surface, and width of the highway, and of any other restrictions or conditions then and there existing; and no person shall drive any vehicle, upon a highway at such a speed as to endanger the life, limb, or property of any person, nor at a greater speed than will permit him to bring the vehicle to a stop within the assured clear distance ahead."

That the Pennsylvania Supreme Court and the United States Circuit Court of Appeals have often held that what is the assured clear distance ahead varies according to the visibility at the time of the accident and that a fog may be so dense on the highway that to proceed at any rate of speed is imprudent.

Questions Presented

The questions herein presented are:

Was the petitioner denied the right of trial by jury by the Circuit Court's order reversing the District Court?

In reversing the District Court, can the Circuit Court refuse to consider testimony upon which the jury's verdict must have been based?

Reasons Relied On for Allowance of the Writ

1. That petitioner was denied the right of trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

2. That respondent's neglect to file specific reasons for his motion for directed verdict was in violation of Rule 50 of the United States District Court.

3. That respondent's failure to file notice in the United States Circuit Court of Appeals of a statement of the points upon which the respondent intended to rely on appeal was a violation of Rule 75 of the United States Circuit Court of Appeals.

4. That before the Circuit Court of Appeals can reverse the District Court and enter a judgment for respondent, testimony introduced for petitioner must be taken as true and viewed in the light most favorable to the petitioner, and that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

5. That the Circuit Court of Appeals cannot, under the law and the Constitution, reverse the District Court and enter a judgment for the respondent.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8601, Peter Raun, Defendant-Appellant, v. Lewis E. Nash, Plaintiff-Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States

Circuit Court of Appeals for the Third Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated August 28, 1945.

JOHN B. BROOKS,
MAURICE J. COUGHLIN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 391

LEWIS E. NASH,

Petitioner,

vs.

PETER RAUN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

The opinion in the United States District Court is reported in the Appendix at Page 186-A.

The opinion in the United States Circuit Court of Appeals for the Third Circuit is reported in the certification of the record at Page 195; and 149 Federal 2nd 885.

Jurisdiction

1. The date of the judgment to be reviewed is May 14, 1945 (R. 199).

The date of the denial of petitioner's petition for rehear-

ing in the United States Circuit Court of Appeals is June 13, 1945 (R. 212).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Act of Congress, March 3, 1891, c. 517, Section 6, 26 Stat. 828; March 3, 1891, c. 231, Section 240, 36 Stat. 1157; February 3, 1925, c. 229, Section 1, 43 Stat. 938; 28 U. S. Code Annotated, Section 347.

3. The United States Circuit Court of Appeals for the Third Circuit had no power under the United States Constitution to reverse the United States District Court and render a judgment for the respondent; such a reversal was an invasion of the province of the jury. In the United States District Court the jury had rendered a verdict and judgment in favor of the petitioner in the amount of Thirteen Thousand Five Hundred ($13,500) Dollars. Briefly the facts upon which that judgment were based may be summarized as follows:

The petitioner brought a civil action for damages founded on an automobile accident which occurred on October 9, 1941, in Erie County, Pennsylvania. He was seriously injured when a heavy truck driven by the respondent collided with an automobile driven by petitioner at the intersection of Route 89 and Station Road. One witness at the scene of the accident testified that visibility was reduced by a fog so that an automobile could not be recognized as such from a distance greater than "from 5 to 6 feet" (R. 33).

The respondent admitted at the trial of the case that he was driving at the rate of from 25 to 30 miles per hour at the time of the collision. In reversing the Trial Court, the Circuit Court arbitrarily refused to consider the testimony quoted above and deliberately relied upon the testimony of another of petitioner's witnesses that the visibility at the time of the collision "reduced the range of vision to from

50 to 100 feet." This attempt by the Circuit Court to select the testimony upon which its decision must depend is in direct violation of any case in the United States Supreme Court and of the Pennsylvania Supreme Court and of the United States Circuit Court of Appeals.

At the trial of the case, the respondent made a motion for a directed verdict but neglected to file any specific reasons for the motion. This was in direct violation of the requirements of Rule 50 of the United States District Court.

4. The cases believed to sustain said jurisdiction are as follows:

Florence J. Bailey v. *Central Vermont Railway, Inc.*, 319 U. S. 350.

Mary Tennant v. *Peoria & Pekin Union Railway Company*, 321 U. S. 29.

Montgomery Ward & Company v. *Luther Duncan*, 311 U. S. 243.

Leroy A. Berry v. *United States of America*, 312 U. S. 450.

Howard Breisch v. *Central Railroad of New Jersey*, 312 U. S. 484.

H. J. Jenkins v. *James M. Kurn*, 313 U. S. 256.

Margaret Conway v. *George H. O'Brien*, 312 U. S. 492.

Edward J. Gunning v. *Gertrude L. Cooley*, 281 U. S. 90.

Aetna Insurance Company v. *John M. Kennedy*, 301 U. S. 389.

Zillah Lyon v. *Mutual Benefit Health & Accident Assn.*, 305 U. S. 484.

Hegarty v. *Berger*, 302 Pa. 221.

Statement of the Case

This has already been stated in the preceding petition under Summary Statement of the Matter Involved which is hereby attached and made a part of this brief.

Specification of Errors

The Circuit Court of Appeals for the Third Circuit erred in holding that the "order of the said District Court denying defendant's (respondent's) motion to set aside the verdict and judgment be, and the same is hereby reversed, with costs, and entry of judgment for the defendant (respondent) is directed. The order denying a new trial is affirmed."

ARGUMENT

Summary of the Argument

Point A. The petitioner was denied the right of a trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Point B. The Circuit Court of Appeals was without power, under the law and the Constitution, to reverse the Trial Court's judgment and verdict in favor of the petitioner.

Point C. The respondent's neglect to comply with the requirements of Rule 50 of the United States District Court should have prevented the consideration by the United States Circuit Court of Appeals of the motion for a verdict notwithstanding the judgment.

Point D. The Circuit Court of Appeals did not apply the specific Pennsylvania statutory definition of negligence and of the "assured clear distance ahead principle."

Point E. The order of the Circuit Court of Appeals reversing the Trial Court does not conform to the established precedents of the Pennsylvania Supreme Court, and particularly of the United States Supreme Court in the cases enumerated below.

1. *Bailey* v. *Central Vermont Railway, Inc.*, 319 U. S. 350.

2. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29.

Point F. The reversal by the Circuit Court of Appeals establishes a precedent directly in conflict with the well-founded legal principle that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

Point G. On the merits of the case, the question of the negligence of the respondent should properly have been left to the determination of the jury.

Point A

The petitioner was denied the right of a trial by jury guaranteed to him by Amendment 7 of the United States Constitution.

Amendment 7 of the United States Constitution—

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

In many recent decisions of the United States Supreme Court the citizen's right to a trial by jury in civil cases has been jealously protected.

An article appearing in 54 Harvard Law Review at Page 694 goes so far as to say that, "Rule 50 of the United States District Court is the latest device to avoid the common law prohibition against awarding judgment notwithstanding the verdict on the basis of the evidence. The problem, however, is largely one of the court's own creation since it is only a much criticized 5-4 decision that perpetuates the prohibition by reading it into the 7th Amendment."

In the case at bar the Circuit Court of Appeals usurped the function of the jury and by substituting its determina-

tion of the facts for the determination made by the jury and the Trial Court has effectively denied the right to a trial by jury. To permit such a precedent to stand is to make meaningless Amendment 7 to the United States Constitution.

In the case of *Tennant* v. *Peoria & Pekin Union Ry. Co.*, reported in 321 U. S. 29, the Court said:

> "We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation."

This case was submitted to the jury on the allegation that Tennant's death resulted from respondent's negligence, in that its engineer backed the train and cars without first ringing the engine bell. There was no direct evidence as to Tennant's precise location at the time he was killed. There was some evidence to indicate that he never walked back on either side of the engine. It was his duty as a switchman to stay ahead of the engine and protect it from other train movements and attend to the switches. No witness testified to the manner in which Tennant died. His body was found upon the railroad track.

In this case the Court said that "petitioner was required to present probative facts from which the negligence and causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the 12 jurors."

In the case at bar witness Mrs. Jones testified that the fog at the scene of the accident was so thick that an automobile could not be recognized as such at a distance of

from more than Five to Six (5-6) feet. The Circuit Court of Appeals arbitrarily ignored the existence of that testimony upon which the jury could have based its verdict. The Circuit Court of Appeals arbitrarily concluded that the visibility at the scene of the accident was limited by fog to from Fifty to One Hundred (50-100) feet. It can hardly be assumed that this was an oversight, because the petitioner in his request for a rehearing called the Court's attention to the testimony of Mrs. Jones. We believe it is particularly important here to note the specific grounds upon which the Circuit Court of Appeals based its reversal of the Trial Court and the jury verdict.

We quote directly from the opinion of the Circuit Court of Appeals:

> "While the testimony showed that defendant's vision ahead was limited by the fog to from 50-100 feet the skid marks on Route 89 extended for only 30 feet before reaching the center of the intersection. If the defendant could have stopped his truck within the distance he could clearly see ahead, i.e., 50-100 feet it cannot be said that he was driving at a negligently excessive rate of speed, there being no other variable factors present."

From this quotation it can be clearly seen that the entire decision of the Circuit Court of Appeals is based upon the arbitrary refusal of the Circuit Court to consider the evidence of the existence of a fog so thick that an automobile could not be recognized as such from a distance of more than Five to Six (5-6) feet.

That is why we say that to permit such a precedent to stand is to establish a principle never before asserted, and a principle that has been specifically denied in so many cases that have appeared before the highest tribunal of the State of Pennsylvania that we deem it needless to enumerate the various citations. The petitioner in the case

at bar did not receive a trial by jury. The Circuit Court of Appeals substitutes its finding of fact for that of the jury.

In *Bailey* v. *Central Vermont Railway, Inc.*, reported in 319 U. S. 350, the U. S. Supreme Court reversed the Supreme Court of Vermont's reversal of the trial judgment for petitioner. Here the Court said:

> "The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence."

The Court cited *Jacob* v. *City of New York*, 315 U. S. 752. Again we quote from the court's decision:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The court held that the evidence of respondent's negligence in failing to provide Bailey with a safe place to work was sufficient to support the verdict of the jury and the judgment of the trial court, and in so holding, reversed the Supreme Court of the State of Vermont.

We cite the case of *Jacob* v. *City of New York*, reported in 315 U. S. 752. This case was brought up on a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment affirming a judgment of the District Court dismissing a complaint in a suit under the Jones Act by a ferry boat employee for personal injuries. The United States Supreme Court reversed and remanded. In the opinion the Court said:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence, which is protected by the

> Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it."

The wrench petitioner was using had become defective for the purpose for which it was designed, and petitioner had on several occasions requested his employer to supply him with an adequate wrench. The Court said:

> "We think these facts entitled petitioner to have the jury consider whether his injury was caused by any defect or insufficiency due to its (respondent's) negligence in its appliances. That is to say, it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work, whether respondent's failure to supply petitioner with a new wrench amounted to negligence on its part, and whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use."

We cite *Lyon* v. *Mutual Benefit Health & Accident Association*, 305 U. S. 484. On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment reversing a judgment of the District Court for plaintiff in an action on a health and accident insurance policy. Reversed by the United States Supreme Court.

The court said:

> "While litigants in Federal Courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such depravation. In effect, that local rule is practically identical with the Federal rule which treats a request by both parties for peremptory instructions without more, as a submission of issues of fact to the Court. It is essential that the right to trial by jury be scrupulously safeguarded, and a State rule of procedure entrenching upon this right would not require observance by Federal courts. However, this Arkansas procedural rule—so closely approximating the Federal rule—does not amount to a prohibited invasion of Federal rights."

The Court held that a request for peremptory instruction by appellant, and the giving of the peremptory instructions by the Court for the adverse party was tantamount to submitting the question to the court sitting as a jury, and the court's finding became a verdict as much as if it had been rendered by a jury upon the issues and the evidence.

> "So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue or whether or not the undertaking was collateral, but the question is, was there any legal evidence to support the finding of the court that the undertaking was original?"

Under the precedents established by the Supreme Court and those cited above, it is clear that the petitioner in the case at bar was deprived of his right of a trial by jury as guaranteed to him by the Seventh Amendment of the United States Constitution.

Points B and C

The Circuit Court of Appeals was without power, under the law and the Constitution, to reverse the trial court's judgment and verdict in favor of the petitioner.

The respondent's neglect to comply with the requirements of Rule 50 of the United States District Court should have prevented the consideration by the United States Circuit Court of Appeals of the motion for a verdict notwithstanding the judgment.

We feel that Points B and C can best be discussed together.

Rule 50 of the United States District Court obligates the respondent to state specific grounds on which he bases his motion for a directed verdict. On October 5, 1943, the judgment was duly entered in favor of the petitioner and against the respondent (181a of the Appendix). On October 8, 1943, the respondent filed a written motion for directed verdict (184a of the Appendix). This motion fails to comply with the requirements of Rule 50, for the reason that it neglected to state any specific grounds on which the motion was based. The very existence of Rule 50 is an attempt to deprive a citizen of the right of a trial by jury according to the rules of the common law. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an Appellate Court for some error of law which intervened in the proceedings. Rule 50 being in derogation of the petitioner's right under the common law, should be strictly construed against the user of the rule. So that the specific requirement that the respondent should file grounds for the rule is an obligation that cannot be lightly dismissed; and the failure of a respondent to strictly

comply with the requirements of the rule should certainly deprive him and the Appellate Court from further considering the motion for a directed verdict.

We cite *Berry* v. *U. S. of America,* 312 U. S. 450. On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment reversing a judgment of the District Court of the United States. Reversed by the Supreme Court. The petition for Certiorari presented two questions: (1) Whether there was sufficient evidence to sustain the veredict; and (2) Whether the Circuit Court of Appeals erred in dismissing the cause instead of remanding it for a new trial. The Court said:

> "This second question envoked our jurisdiction in order to obtain an authoritative construction of Subdivision B of Rule 50 of the Rules of Civil Procedure. In part, that subdivision provides, whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict. Since the Government made no such motion within ten days after the verdict, petitioner urged here that the Circuit Court of Appeals was without power to dismiss the cause, but should have remanded it for a new trial. But while this important point upon which the Circuit Court of Appeals are not in complete agreement, is one of the two questions upon which the petition for Certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court

> properly denied the Government's motion for a directed verdict in its favor."

Again the court said:

> "Rule 50 goes further than the old practice, in that District Judges under certain circumstances are now expressly declared to have the right to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the Constitutional tribunal provided for trying facts in courts of law."

In the *Galloway* case cited below, the Court said, the guarantee of a jury trial in suits at common law, given by the Seventh Amendment to the Federal Constitution, and the provision of that Amendment that no fact tried by a jury shall be otherwise re-examined in any court than according to the rules of the common law, does not bind the Federal Courts to the exact procedural incidents or details of court trial according to the common law of 1791, nor confine them, in their regulation of the jury's rule on questions of fact, to the two methods then generally used, i.e., the demurrer of the evidence and the motion for a new trial. But the *Galloway* case was an action against the United States Government, and thus clearly distinguished from the case at bar, for there existed under the common law no right to proceed by a legal process against the sovereign. And this distinction was clearly made in the opinion of the *Galloway* case.

It is one thing for a trial court to grant a motion for a directed verdict; it is quite another and a different thing for the Circuit Court of Appeals to entertain such a motion.

As pointed out by Justice Black in his dissenting opinion in the *Galloway* case, Alexander Hamilton emphasized

our meaning when he declared, "Jury verdicts should be re-examined if at all, only by a second jury, either by remanding the case to the court below for a second trial of the fact or by directing an issue immediately out of the Supreme Court." To cast overboard the jury's verdict and the trial court's opinion is a judicial act that requires the closest possible scrutiny, and, we submit, was in the case at bar a direct violation of petitioner's right under the Constitution. The Circuit Court of Appeals had no power to promulgate such an order, and surely on the merits of the case the reversal cannot be justified. This we should like to discuss further on in the brief.

POINT D

The Circuit Court of Appeals did not apply the specific Pennsylvania statutory definition of negligence and of the "assured clear distance ahead principle."

As amended in 1939 and 1941, April 5, P. L. 17, No. 10, Sections 1 and 2, and as fully reported in 75 Purdon's Pennsylvania Statutes, Annotated, Section 501, the specific Pennsylvania "assured clear distance ahead principle" is promulgated as follows:

> "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic surface, and width of the highway, and of any other restrictions or conditions then and there existing; and no person shall drive any vehicle, upon a highway at such a speed as to endanger the life, limb, or property of any person, nor at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead."

What is the assured clear distance ahead varies according to visibility and other conditions.

In *Janeway* v. *Lafferty Bros.*, reported in 323 Pa. 324, the Court said:

> "This, as we held in Stark v. Fullerton, 318 Pa. 541, requires that a driver keep his car under such control that he can always stop within the distance that he can clearly see, this distance, of course, varies with the circumstances. The range of vision may be shortened by storm, fog or other conditions."

In *Lauerman* v. *Strickler*, reported in 141 Pa. Superior 240, the Court said:

> "This implies that the driver will always be carefully watching so much of the road as is included within that assured clear distance ahead and will always keep his car so under control that he can stop it within that distance. What this will be, of course, will vary according to the visibility at the time and other attending circumstances, but, after taking those circumstances into consideration, the requirement is fixed and unchangeable."

In *Rocco* v. *Tillia*, 106 Pa. Superior 597, the Court said:

> "It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his lights, or within the distance to which his lights would disclose the existence of an obstruction. If the lights on the automobile would disclose obstructions only 10 yards away, it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance."

The Pennsylvania Supreme Court in *Shoffner* v. *Schmerin*, 316 Pa. 323, has held that:

> "Fog may be so dense on the highway that to proceed at any rate of speed is imprudent."

This specific Pennsylvania statutory principle is so well established by decisions of the Pennsylvania Supreme Court and Pennsylvania Superior Court and recognized by decisions of the Federal Courts, that it is hardly necessary to extend the argument that a respondent who drives his automobile at the rate of 25-30 miles per hour through a fog so thick that an automobile could not be recognized as such from a distance of more than Five to Six (5-6) feet is guilty of negligence. And yet that is the case at bar. This case necessarily establishes the principle that a respondent can safely drive an automobile at 30 miles per hour through a fog with a restricted visibility to Five to Six (5-6) feet and seriously injure a citizen and a jury of Twelve men can be persuaded that he was guilty of negligence, and yet the Circuit Court can throw it all overboard and declare that such handling of an automobile under such a set of circumstances was not negligence.

The necessary consequences of such a precedent is to deprive American citizens of their right of trial by jury in civil cases.

Point E

The order of the Circuit Court of Appeals reversing the Trial Court does not conform to the established precedents of the Pennsylvania Supreme Court, and particularly of the United States Supreme Court in the cases enumerated below:

1. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350.

2. *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29.

Both of the cases cited above have been reviewed in this brief.

The United States Supreme Court has held in *Gunning* v. *Cooley*, 281 U. S. 90, that:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

In *Scalet* v. *Bell Telephone Co. of Pa.*, reported in 291 Pa. 451, the Court said:

"The assignment of error complained only of the refusal to give binding instruction for defendant. Under these circumstances all the evidence and inferences therefrom favorable to plaintiffs, must be taken as true and all unfavorable to them, if dependent solely on testimony must be rejected. When these matters are the only ones to be considered, the courts do not inquire whether one party or the other has the weight of the evidence. On the questions actually raised by the assignment, the only point we are asked to decide is, do the verdicts depend for their support on evidence which is shown to be untrue by incontrovertible physical facts, and contrary to human experience and the laws of nature."

"Incontrovertible physical facts" is defined in *Hegarty* v. *Berger*, 302 Pa. 221, as follows:

"We have frequently held that incontrovertible physical facts are never established by oral evidence as to position, speed, etc., of movable objects."

In the case at bar Mrs. Jones testified, as we have referred to above, that the visibility at the scene of the accident was reduced by fog so that an automobile could not be recognized as such at a distance greater than Five to Six (5-6) feet. This evidence the Circuit Court of Appeals could not

overlook. It was the basis for the foundation of the jury's verdict in favor of the petitioner and taken together with the admission of the respondent that he was traveling at 25-30 miles per hour at the time of the collision it establishes beyond all question the negligence of the respondent.

But the Circuit Court of Appeals did either overlook the evidence of Mrs. Jones or refuse to apply the specific Pennsylvania statutory "assured clear distance ahead principle", and in either event the decision should be reversed. It is perhaps significant to note at this point that in the report of *Nash* v. *Raun*, 149 Federal 2d 885, the syllabus carries the following paragraph:

Paragraph 2 under Automobiles Key #168 (8):

> "Where fog limited visibility to from Fifty to One Hundred (50-100) feet, a truck driver who could stop within such distance could not be said to be driving at a negligently excessive rate of speed, if no other variable factors were present."

This is a recorded precedent which does not under the argument submitted in this point describe the facts of the case at bar.

Did the Circuit Court of Appeals eliminate the testimony of Mrs. Jones? If so, the certiorari should be granted because the decision is not in conformity with the referred to decisions of the Pennsylvania Supreme Court and to decisions rendered in other Circuits of the United States Circuit Court of Appeals.

And we might ask another question. In thus reversing the Trial Court, can the Circuit Court of Appeals be permitted to so befog the true issues in this case that the petitioner would be effectively deprived of his right of trial by jury?

If that is so, then we must face the fact that the right of trial by jury is restricted and limited. The citizen,

under that ruling, has the right of trial by jury only if the jury happens to guess the Circuit Court's appraisal of the facts. It need hardly be argued that the inevitable consequences of such a principle is the total destruction of the right of trial by jury.

Point F

The reversal by the Circuit Court of Appeals establishes a precedent directly in conflict with the well founded legal principle that the evidence supporting the verdict must be proved untrue by incontrovertible physical facts.

We deem it unnecessary to add to the citations contained above under Point E.

In *Kindt* v. *Kramer*, 43 Atlantic 2d 145, the Court said:

> "Judging the credibility of a witness and the weight of his testimony is jury's function."

Point G

On the merits of the case, the question of the negligence of the respondent should properly have been left to the determination of the jury.

In addition to the negligence of the respondent which we have pointed out particularly under Point E, we wish to call the Court's attention to the opinion of the Trial Judge (189-A):

> "The evidence from which plaintiff contends that negligence on the part of the defendant could be inferred by the jury is as follows: (1) the noise of the collision heard by the Jones family at their home some three hundred feet away from the scene of the accident; (2) The damage to plaintiff's automobile (shown in Plff's Ex. No. 2), which indicates that plaintiff's automobile was struck by defendant's truck on the side with great force; (3) The damage to defendant's truck, i. e., the damaged headlights and bent front axle—in-

dicating that the truck ran into the side of plaintiff's automobile; (4) The position of plaintiff's automobile after the accident, indicating that it must have been running at low speed at the time of the collision; (5) The position of the defendant's truck after the accident, indicating that it must have been running at high speed at the time of the collision; (6) The skid marks on Route 89 on the right side (east lane of traffic) for a distance beginning thirty feet south of the intersection, indicating defendant must have applied his brakes thirty feet from the intersection, and must have been proceeding at high speed, as shown by the fact that the truck proceeded north of the intersection for a distance of more than fifty feet when the truck turned over on its right side, skidding several feet in a northerly direction; (7) Evidence that plaintiff was found lying unconscious at a distance of some twelve feet from the place where his car came to rest, disclosing the force of the collision; (8) Evidence that the engine of the plaintiff's car was still running after it came to rest, indicating that the gear of his car was in neutral at the time of the collision, and that the plaintiff was in the process of changing gears at the time the collision took place; (9) Evidence that seventy-five milk cans from defendant's truck were scattered over the pavement at the scene of the accident, showing the force of the collision; (10) Evidence of poor visibility at the scene of the accident on account of fog, indicating the defendant was traveling too fast as he approached the intersection."

We concede that the mere proof of an accident is insufficient to establish negligence. But we submit that this array of circumstantial evidence can surely be relied upon to establish negligence.

In answer to these circumstances the respondent relies on his uncorroborated testimony that there existed no fog at the scene of the accident; that he was traveling at 25-30 miles per hour; that he never saw the petitioner

until he was about Six (6) feet away from him; and that the petitioner was traveling at a high rate of speed.

It is apparent that the Circuit Court adopted as conclusive the testimony of the respondent "that plaintiff's car flashed into view from the right going about 50 miles per hour when defendant was about six feet from the intersection; and that although he applied the brakes he was unable to avoid the collision."

The jury were certainly justified, from the circumstances surrounding the happening of this accident, the other testimony of Mr. Raun and that of his witness, Mr. Arthur Scholton, whose testimony was discredited and contradicted by himself and other witnesses, in concluding that his was not the right description of the happening of the accident.

We do not hesitate to go further and to say that the jury could well have determined that the accident could not have occurred in the manner in which Raun described it, that his description of the accident is controverted by the physical facts. We refer particularly to the hump hazard which would prevent a car approaching Route 89 from the east on Station Road traveling over that hump hazard at any but a very slow rate of speed.

We deem it appropriate here to discuss the strange testimony of Arthur D. Scholton. It is particularly significant that such a star witness should have received only slight consideration in the brief of the respondent filed before the Circuit Court of Appeals. We can understand the embarrassment of the respondent when we examine carefully the discredited evidence of this witness. The jury surely had a right to conclude that the witness discredited himself. His elaborately concocted story to justify his presence at the scene of the accident was also discredited by petitioner's rebuttal witness, Mr. Roy Butler. (155-A) (154-A) (157-A) (138-A) (139-A) (151-A) (152-A).

Obviously the jury did not believe the testimony either of Mr. Scholton or the respondent, Mr. Raun. The disbelief of the jury could not, under the law, be attacked by the Circuit Court of Appeals; and it is just as obvious that the jury did believe the testimony of Mrs. Jones and other witnesses for the petitioner. The Circuit Court of Appeals has no power, under the law, to question the credibility of the witnesses whom the jury and the Trial Judge saw fit to believe.

We think that Oliver Wendell Holmes, Jr., in "The Common Law," has clearly defined the function of the Court and jury:

> "Many have noticed the confusion of thought implied in speaking of such cases as presenting mixed questions of law and fact. No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply in the first half, the whole complex averment is plain matter for the jury without special instructions, just as a question of ownership would be where the only dispute was as to the fact upon which the legal conclusion was found. But when a controversy arises on the second half, the question whether the Court or the jury ought to judge of the defendant's conduct is wholly unaffected by the accident, whether there is or is not also a dispute as to what the conduct was."

It is clear that the jury's determination that the respondent has done or omitted certain things cannot be obliterated by any act of the appellate Court.

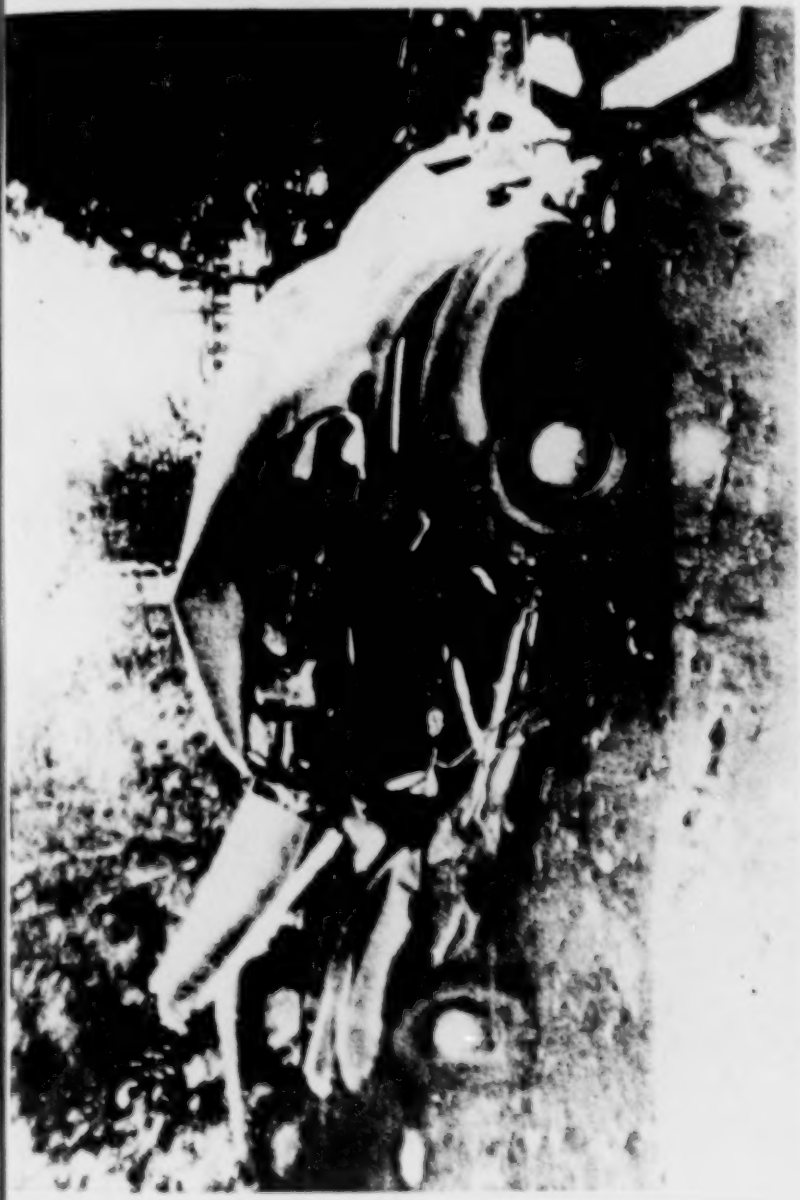
It is perhaps unnecessary to say that our only purpose in this proceeding is to prevent the establishment of a precedent which will encroach upon the citizen's right of

trial by jury under the 7th Amendment of the United States Constitution.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

JOHN B. BROOKS,
MAURICE J. COUGHLIN,
Counsel for Petitioner.

PLAINTIFF'S EXHIBIT 2



DEFENDANT'S EXHIBIT "C'

IN THE

Supreme Court of the United States

October Term, 1945

No. 391

LEWIS E. NASH,
Petitioner

vs.

PETER RAUN,
Respondent

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CASES CITED

COUNTER-STATEMENT OF THE CASE

This is a civil action for damages by reason of an automobile accident which occurred October 9, 1941, in Erie County, Pennsylvania, at the right angle intersection of Route 89, a through highway, and an intersecting road known as Station Road (85a). Route 89 runs north and south, Station Road east and west (75a).

The petitioner was driving an automobile westwardly on Station Road toward the city of Erie (41a) and the respondent was driving his truck northwardly on Route 89, a through highway (112a). The intersection was controlled by a stop sign on Station Road, *facing* the oncoming *petitioner* (85a).

The petitioner offered no eyewitness testimony as to the happening of the accident, claiming he had, by reason of injuries to his head, lost all recollection of what had happened after he passed a point approximately three-quarters of a mile removed from the intersection (44a, 45a).

The vision which the two drivers had of each other approaching from the directions indicated was rather badly obscured by a row of six trees as well as by a bank approximately three to four feet high, at the southeast corner of the intersection (75a, 76a). Petitioner failed to prove by any testimony that he *had stopped at the stop sign before proceeding into the intersection. Petitioner based his case entirely upon circumstantial evidence.*

Counter-Statement of the Case

The circumstantial evidence was substantially as follows:

Lloyd Jones who lived three hundred to three hundred and fifty feet south of the intersection, heard the sound of the collision and upon reaching the scene saw the automobile in the ditch northwest of the intersection, standing on its four wheels facing south, its engine running and its left side crushed in and the door on the right side open (9a-13a). The petitioner was in the ditch back of the car unconscious (13a). The truck was lying on the west side of Route 89 about 12 feet north of the back end of the Nash car (15a). Some milk cans were scattered in the ditch and there were tire marks on Route 89 on the right hand side approaching the intersection (17a), but they did not lead to the truck and were not identified as having been made by it. There were also skid marks running from approximately the center of the intersection towards the Nash car. These were broad "wavery" lines and not distinct (19a, 20a). Jones testified it was foggy and that the front end of the truck was damaged and the axle bent four inches out of line (16a). This testimony was corroborated by Robert Russel Jones and Margaret S. Jones. .

This was the petitioner's case and the counsel for the respondent moved for a directed verdict which motion was overruled.

For the respondent, Peter Raun himself testified that he looked both ways approaching the intersection and saw nothing, but when within six or eight feet of it, a car flashed in front of him from the east, resulting in the collision (113a). He testified that this car, driven by the petitioner,

Nash, was going at least fifty miles per hour (113a) and did not stop at the "STOP" sign.

Arthur D. Scholton, a witness for the respondent, had followed the petitioner from a point one-half to three miles east of the intersection and he testified that the petitioner passed him at a speed of at least fifty miles per hour and that he *never slowed down* for the *"STOP" sign* at the intersection (128a, 129a).

Raun and Scholton were the only eye witnesses to the happening of the collision and the events immediately preceding.

At the conclusion of all the testimony in the case the respondent once again renewed his motion for a directed verdict and also presented a point for binding instructions, both of which were denied. The court stated it was a close case (66a).

The jury then brought in a verdict in favor of the petitioner in the amount of $13,500.

Subsequently the respondent filed a motion for a new trial and a motion for judgment n. o. v. These motions were subsequently overruled and judgment entered on the verdict. From this judgment the respondent took an appeal to the Circuit Court of Appeals for the third circuit, which court reversed the judgment of the trial court and directed the entry of judgment for the respondent. Later the petitioner filed a petition for reargument which was overruled by the Circuit Court of Appeals. After a mandate was issued to the District Court the petitioner filed his petition for a writ of certiorari in this court.

ARGUMENT

POINT A

The petitioner alleges that he was denied the right of trial by jury, entitled to him by the Seventh Amendment of the United States Constitution. Such a position is untenable and can best be answered by quoting what the Supreme Court said in the case of *Galloway vs. United States* reported in 319 U. S. 372. In that case the court held:

> "If the intention is to claim generally that the [7th] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure.
>
> Furthermore, the argument from history is not convincing. * * * (389)
>
> * * * The more logical conclusion we think, and the one which both history and the previous decisions here support is that *the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements*, not the great mass of pro-

cedural forms and details varying even then so widely among common-law jurisdictions. * * * (392)

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises. * * * Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. * * *'' (Italics added)

In support of his contention on this point the petitioner has cited several Supreme Court cases which we might examine briefly. In the case of *Tennant vs. Peoria & Pekin Union Railway Company*, 321 U. S. 29, the action arose under the Federal Employers Liability Act. Tennant was killed by a backing train and the evidence was undisputed that one of the rules of the company was, that before backing a signal had to be given. It was admitted, no signal was given in this instance. Certainly this was evidence for the jury. Moreover, in that case, the Circuit Court, instead of taking the evidence in the case, speculated as to how, in its opinion, the accident might have happened.

The case of *Bailey vs. Central Vermont Railway, Inc.*, 319 U. S. 350, also arose under the Federal Employers Liability Act. The question involved was whether or not the defendant had furnished his employees a safe place to work. The evidence was, that there was only twelve (12) inches of footing at the side of the car and eight (8) or nine

(9) inches of this was taken up by timber. The Supreme Court held that this was a case for the jury.

The case of *Jacob vs. City of New York*, 315 U. S. 752, involved an action brought under the Jones Act. Under the provisions of this act, the employer of seamen is liable for defect in its appliances and other equipment. The plaintiff, in his duties had to use a wrench which was badly worn. On three occasions he asked for a new wrench but none was given him. The trial court refused to allow the case to go to the jury on the "Simple Tool Doctrine". The Supreme Court reversed, stating that it was for the jury to decide whether the plaintiff used a reasonable safe and suitable tool and whether the defendants failure to supply a new wrench did not amount to negligence and whether, further, that the "Simple Tool Doctrine" under these facts did apply.

Lyon vs. Mutual Benefit Health and Accident Association, 305 U. S. 484, arose from a claim by beneficiary on a health and accident policy. The State in which the case was tried, had a rule similar to the Federal Rule and after the plaintiff presented her evidence, the defendant moved for peremptory instructions and offered no evidence. This was refused and the verdict rendered for the plaintiff. The Court of Appeals of Arkansas reversed on the grounds that the oral evidence of payment was incompetent because it represented an effort to alter the terms of a written contract. The Supreme Court held that the evidence was not an attempt to alter a written contract but merely show that the premium was paid in advance and that the policy was in full force and effect at the time of the decedent's death and it further held that the case had proceeded on

the belief that a question of law was involved and that neither party indicated the desire to have the jury pass on any facts. The Supreme Court held also that this procedure rule did not amount to a prohibited invasion of rights.

We are unable to see what bearing any of the above cases have on the case now before the court. In those cases cited above, wherein the Supreme Court held that a jury trial should have been granted, there was without exception sufficient evidence for the plaintiff to warrant submission of the issues to a jury.

In the present case, not one eye-witness was called by the plaintiff and the petitioner's argument, as to evidence is based on an allegation that Mrs. Margaret Jones stated that the fog was so dense that she could see only five (5) or six (6) feet. However, *she was not an eye-witness* and did not arrive at the scene until some time after the accident. Mrs. Jones testified that after the crash she turned off her stove, was ready to leave the house and then went back to place a long distance phone call for an ambulance so that she did not actually leave for the scene until some time less than fifteen (15) minutes after the collision (33a to 35a).

Not only did the petitioner emphasize this evidence on his appeal to the Circuit Court of Appeals but he dwelt at great length on it in his petition for rehearing before that court, so that the matter was passed on not once but twice by the Circuit Court of Appeals.

Mrs. Jones' son, Robert, was eating when he heard the crash. He left at once for the scene of the accident, which was approximately 300 to 350 feet away. He arrived at the

scene in such period of time after the crash as it would have taken to travel this distance. He testified that the visibility was 50 to 100 feet (25a). The defendant testified that the sun was shining at the time of the accident (110a-111a), and the only other eye-witness, Scholton, testified that the weather conditions were such that at the time of the accident one could have driven up to the legal speed limit (130a). The court will take judicial notice of the fact that fog may roll in and out of a given locality in a very short period of time and we contend, therefore, that the fact that an intersection was foggy sometime after an accident is no evidence as to condition at a prior time.

Argument

POINTS B AND C

The petitioner in his petition for rehearing, in the Circuit Court of Appeals, contended that the respondent had failed to comply with rule 50 of the Federal Rules of Civil Procedure. At that time we felt that the petitioner was honestly mistaken and had overlooked the record in the case and in our answer to the petition for rehearing, we pointed out in detail how the respondent had complied with the requirements of this rule. The petitioner again urges this position on the Supreme Court and we must now believe that he is deliberately attempting to mislead the Court in stating that the respondent failed to comply with this rule. In answer to these points the Court's attention is directed to Page 61a of the record. A reading of Pages 61a to 63a, reveals that a motion for a directed verdict was made and five reasons were assigned for the motion. Discussion on the motion continued through Pages 63a to 66a.

Furthermore, there is nothing in this discussion to show that the respondent withdrew his motion, but at all times he insisted upon the granting of the same.

On Page 65a, the District Court raised the question as to whether the respondent could proceed with his counterclaim if the motion prevailed. The discussion on that point ended and there was no indication whatsoever of the respondents intention to withdraw this motion for a directed verdict. The motion was renewed at Page 74a and also was brought to the court's attention again by an exception at Page 79a.

On October 8th, 1943, after judgment had been entered

against the respondent, he filed a written notice asking that judgment be entered in accordance with his previous motion for a directed verdict. In doing so the respondent complied with rule 50(b), which states:

> "Within 10 days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict."

This the respondent did, using the exact language of the rule in making his motion. We have shown that several grounds were set forth in the motion for a directed verdict as required by rule 50(a).

It might further be stated that it is unnecessary to file reasons in support of a motion for judgment notwithstanding the verdict because that situation is governed by rule 50(b).

These points were urged at great length in the petitioner's request for rehearing before the Circuit Court of Appeals.

As was pointed out by the Supreme Court, in *Berry vs. United States of America*, 312 U. S. 450, it has never been decided definitely whether it is even necessary to move to have a judgment entered upon a verdict set aside.

We have referred to the opinion of the Supreme Court in the Galloway case cited by the petitioner under Point A.

POINT D

We have no dispute with the cases set forth under Point D, in the petition, in fact, the Circuit Court of Appeals quoted the cases on which the petitioner relies in its opinion, ordering judgment for the defendant. The court said:

> "Plaintiff argues that the evidence shows that defendant was traveling at an excessive rate of speed and failed to have his car under proper control. He relies on the principle that the driver of a motor vehicle is required to keep his car at a speed and under such control that he can stop within the distance he can see ahead, Janeqay v. Lafferety Bros., 323 Pa. 324, 185 Atl. 827, which may be reduced by atmospheric conditions or other visual obstructions. Simrell v. Schmerin, 316 Pa. 323, 175 Atl. 516. While the testimony showed that defendant's vision ahead was limited by the fog to 'from 50 to 100 feet', the skid marks on Route 89 extended for only thirty feet before reaching the center line of the intersection. If the defendant could have stopped his truck within the distance he could clearly see ahead, i. e., fifty to one hundred feet, it cannot be said that he was driving at a negligently excessive rate of speed, there being no other variable factors present. The law does not require that the speed be such that a driver can avoid hitting an object that suddenly appears a short distance before him. To do so would impose too great a burden upon the driving public. If the obstacle is for the first time within the driver's view, after the driver has passed the point of

> assured clear distance ahead, the measuring point having been reached and passed, then the defendant cannot be said to be driving at a negligent speed and without his vehicle under proper control merely because he cannot now avoid a collision. Stark v. Fullerton Trucking Co., 318 Pa. 541, 179 Atl. 84. At best, the evidence indicated that plaintiff's car first came into view after the defendant had passed the measuring point (50 to 100 feet before the intersection)." (197 and 198). 149 F. (2d) 887, 888.

We can add little to what the court said above, except to reiterate that there was no evidence that visibility *at the time of the collision* was reduced to between 5 and 6 feet, but we would like to emphasize that at the time of the accident, the respondent was on a properly marked through highway and that the petitioner was on an intersecting highway, and it was the respondent's duty to stop to permit traffic on the through highway to pass.

POINT E

There is no doubt that the law in Pennsylvania, in such situations as this is, "all the evidence and inferences therefrom favorable to the plaintiff must be taken as true and all unfavorable to them, if dependent solely on testimony must be rejected." The Circuit Court applied this very rule of law in the present case. It will be remembered that the respondent testified that the sun was shining at the time of the accident (111a) and he was corroborated by Scholton (130a). The Circuit Court of Appeals disregarded entirely this testimony of the respondent and accepted the testimony of the petitioner that the visibility was from 50 to 100 feet. Since the petitioner seems to base almost his entire argument on the question of visibility, we might examine this point in some detail. Lloyd Jones, the husband of Mrs. Margaret Jones, lived between 300 and 350 feet from the scene of the accident (10a). Upon hearing the crash he left the house through the door nearest the intersection and walked to the intersection to see what had taken place (11a). He stated that he looked at the position of the cars (11a), that he saw Mr. Nash lying on the ground, examined him and placed him in a horizontal position (15a). He looked around the vicinity for Mr. Raun. Robert Jones, the son of Margaret and Lloyd Jones accompanied his father to the scene of the crash and he examined the Nash car (23a), helped move Nash, attempted to stop the motor in the Nash car, climbed into the truck and looked around for Raun. He testified that when he reached the intersection, *the visibility was from* 50 *to* 100 *feet* (25a). Mrs. Margaret Jones, on whose testimony the petitioner bases

his entire argument stated that she heard the collision, then went back to her kitchen, regulated the stove before she started to go out (26a). She further admitted that she did not leave the house immediately, although it was less than fifteen minutes after the collision, but before she got away from the house, her son, Robert, came back and called to her from the driveway, asking her to call an ambulance and that she placed an out of town call for the ambulance (35a). She waited until the call was completed. After doing all this Mrs. Jones went to the scene of the accident and testified that the visibility was 5 or 6 feet (36a). It will be seen from the above, that the Circuit Court took the testimony of the petitioner as to the visibility and disregarded entirely the testimony of the respondent.

We do not see how a jury could have been permitted to consider the testimony of Mrs. Jones as to fog and visibility when she reached the intersection some fifteen minutes later as bearing upon the visibility when the collision occurred.

The petitioner has referred to the case of Scalet vs. Bell Telephone Company of Pennsylvania, 291 Pa. 451. We can see no relationship between that case and the present situation. There, the defendant asked that the judgment be reversed on the grounds that the testimony was opposed to incontrovertible visible facts. There is no such situation in our case.

Argument

POINT G

The petitioner has gone to great length to attack the testimony of Arthur Scholton. On reading his testimony, one may reach the conclusion that he is not over-intelligent, but that does not impeach his credibility. It might be interesting to note that in the petitioner's motion for rehearing, in the Circuit Court of Appeals, he referred to some of Scholton's testimony in support of his motion (207). However, the question of the credibility of the witness is not before the court in these proceedings, the only question being, whether or not the Circuit Court of Appeals erred in finding that there was no evidence to support the verdict.

The petitioner has referred to a portion of the opinion of the trial judge, wherein he summarizes certain circumstantial evidence and which he contended justified the verdict. We fear that the trial judge, here, speculated on what might have happened. This is the very situation condemned by the Supreme Court in the case of *Tennant vs. Peoria & Pekin Union Railway Company*, 321 U. S. 29. It has been held:

> "Circumstantial evidence to sustain a verdict must be so strong as to preclude the possibility of injury in any other way, and provide as the only reasonable inference the conclusion for which the contention is made * * *" (Italics ours)
>
> *Pfendler v. Speer, Appellant*, 323 Pa. 443, 448, 185 A. 611;

See also *Skrutski v. Cochran, et al.*, 341 Pa. 289, 19 A. (2d) 106;

Kelly v. Phila. Transportation Co., 146 Pa. Superior 445, 23 A. (2d) 57.

With regard to the position of the automobiles and other objects after the accident, such evidence is of very little value and certainly insufficient to establish negligence. As has been said:

> "*Automobile accidents and collisions are attended by strange, unexpected and apparently incredible results which seem to defy the commonly known laws of physics and their effects. Without data on the phenomena of automobile collisions, without text-books of experience or scientific experiment, without an accepted standard, without even accurate information of the weights and speeds of the instant vehicles and the angle of the blow, this court has no basis which would justify it in taking judicial notice that plaintiff's car could not have been thrown into its position by the impact,* if it were standing still when struck, when it is hardly less mysterious how it got into that position at all.
>
> The courts are properly slow to take judicial notice of the phenomena attending colliding forces because as was said in Basting v. Brooklyn Heights R. Co., 39 App. Div. 629, 57 N. Y. S. 119, 120: '*The study of accidents shows strange and inscrutable results, sometimes stranger than fiction;*' and in Spiro v. St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684, 688: '*Freakish effects are sometimes caused by violent impacts of moving bodies;*' and in Lang v. Missouri

Pacific R. Co., 115 Mo. App. 489, 497, 91 S. W. 1012, 1013: '*So frequently do unlooked for results attend the meeting of interacting forces that courts, in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable* that no room is left for the entertainment, by reasonable minds, of any other'." (Italics ours)

Prove v. Interstate Stages, Inc. et al. (Mich.), 231 N. W. 41, 44.

"*Perhaps a physicist, if he knew with certainty the angles at which two automobiles were being projected at the moment they collided and knew their respective weights, the resistance power of the material of which they were constructed, respectively, and the positions and distances from the point of collision, could determine accurately the rate at which each automobile was going when they collided.*" (Italics ours)

Meeker v. Teer, 122 S. W. (2d) 338, 339 (Tex.).

"*So many facts enter into the movements of cars after accidents that it cannot be laid down as a general rule that the position of a car after an accident necessarily proves anything* with respect to its position before the accident, nor does the location of the damage to each of the cars in a collision necessarily prove anything about the location where the collision took place. In some cases the physical evidence might be persuasive, and in other cases, the physical evidence might be capable of many different interpretations. State v. Hopkins, 173 Md. 321, 196 A. 91 (5, 6). In a case like

that before us where there is nothing but physical evidence, great care should be taken not to permit the jury to speculate on possible causes of which there is no tangible proof." (Italics ours)

Gloyd v. Wills, (Md.) 23 Atl. (2d) S. 665.

This circumstantial evidence, mentioned by the trial judge, was brought at great length to the attention of the Circuit Court of Appeals. There can be no doubt that the Circuit Court considered the matter, for it said in its opinion:

"The position of the two vehicles after the accident was also strongly relied upon by the plaintiff as proof of defendant's negligence. Plaintiff contended that the position in which the defendant's truck rested at a point approximately fifty feet north of the intersection indicated a negligently excessive rate of speed. The defendant contended that the 'top-heavy' truck swung in a wide arc after the sudden stop and that centrifugal force turned the truck around and threw it up the road. Either theory is logical. Only a skilled physicist by using complicated formulae might explain what actually did happen. Evidence which tends to support two conflicting hypotheses tends to support neither and the circumstantial evidence, as presented, leaves the question of the defendant's speed in a conjectural vacuum.

The other circumstances relied on by the plaintiff, —the noise of the collision, the position in which the plaintiff was found, the scattered milk cans—are all indicative of the great force of the collision. But plaintiff failed to establish that the force with which

the defendant struck the plaintiff was such that the defendant could not have stopped his truck within the "fifty to one hundred feet" which the law allowed him under the circumstances. Although the evidence might support a finding that defendant could not stop his truck within thirty feet—the length of the skid marks—there is no substantial proof whether he could have stopped within fifty to one hundred feet. Without this proof plaintiff has not proved negligence. Although it is not necessary to prove negligence by direct evidence, the plaintiff must at least establish circumstances from which negligence may be inferred. Ranck v. Sauder, 327 Pa. 177, 193 Atl. 269; Delmer v. Pittsburgh Railways Co., 348 Pa. 147, 34 A. (2d) 502; Madden v. Lehigh Valley R. Co., 236 Pa. 104. The duty rests upon the plaintiff to so picture the facts upon which he bases the liability of the defendant as to enable the jury to visualize the occurrence and form an independent judgment thereon. Mack v. United States Gypsum Co., 288 Pa. 9, 135 Atl. 623; Lithgow v. Lithgow, 334 Pa. 262, 5 A. (2d) 573. The mere fact that there was an accident and that the plaintiff was not himself negligent does not, per se, mean that the defendant must have been negligent. Sajatovich v. Traction Bus Co., 314 Pa. 569, 172 Atl. 148; McAvoy v. Kromer, 277 Pa. 196, 120 Atl. 762; Flanigan v. McLean, 267 Pa. 553, 110 Atl. 370; Erbe v. Philadelphia Rapid Transit Co., 256 Pa. 567, 100 Atl. 966. The circumstantial evidence presented in the present case is as consistent with the theory that the defendant was not negligent as it is with the theory he was. If the plaintiff cannot show the possibility of a conclusion of defendant's negligence supported by a clear preponder-

> ance of its likelihood, Ott v. Boggs, 219 Pa. 614, and excluding other probabilities just as reasonable, Alexander v. Pennsylvania Water Co., 201 Pa. 252, the plaintiff should not be permitted to go to the jury. The circumstances must compel the conclusion that the defendant was negligent. Pflendler v. Speer, 323 Pa. 443, 185 Atl. 618. The jury may not be allowed to guess." (197 and 199) (149 F. (2d) 887, 888)

We respectfully submit that there is no merit whatever in the petition. This was a case tried without eyewitnesses for the petitioner. The petitioner was under a heavy disability because he was coming out of a road controlled by a stop sign into a through highway which the respondent was traveling. Without proving by evidence that he stopped at the stop sign, he attempted to base his case upon an alleged lapse of memory and on the position of the cars after the accident. Upon analysis the position of the objects after the accident as well as the question of poor visibility, proved to be wholly inadequate to establish negligence on the part of the respondent. The trial court recognized that it was a close case on the question of giving binding instructions and so stated in the record.

The Circuit Court of Appeals heard a full and complete argument and decided that there was insufficient evidence. In a petition for rehearing the petitioner again advanced every possible argument to the Circuit Court of Appeals. This was refused after careful consideration. There is no real constitutional question whatever in the case and this petition for a writ of certiorari merely represents another attempt to have the facts considered once again. As to the proposition that the petitioner has been

denied a trial by jury we confidently rest our case upon Galloway vs. United States, 319 U. S. 372, supra.

Wherefore we respectfully urge that the petition be denied.

Respectfully submitted,

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